No. 17-1183

IN THE

Supreme Court of the United States

AIRLINE SERVICE PROVIDERS ASSOCIATION, ET AL.,

Petitioners,

v.

LOS ANGELES WORLD AIRPORTS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

ATA and its members have a strong interest in ensuring that Congressional policy establishing a deregulated trucking industry is not undermined by a patchwork of state-level impediments to the safe and efficient flow of commerce. Moreover, ATA has special familiarity with the issue of preemption under the Federal Aviation Administration Authorization Act (FAAAA) and the materially identical preemption provision of the Airline Deregulation Act (ADA), because it actively participated in the formulation of Congress's policy of deregulating the trucking industry. See*, e.g.*, H.R. Conf. Rep. No. 103-677, at 88

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* Counsel for petitioners and respondents received timely notice of the intent to file this brief, and both parties have consented to its filing. See Rule 37.2(a). Pursuant to Rule 37.6, amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus, its members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

(1994). Since that time, ATA has been involved, either as a party or an amicus, in many of the decisions of this Court interpreting and applying the preemption provisions of the FAAAA and the ADA, including *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014); *American Trucking Associations, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013); and *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have explained how the decision below is inconsistent with this Court's precedents, and squarely conflicts with the decisions of other circuits. ATA submits this brief to further emphasize the importance of this issue not just for the airline industry but also for the trucking industry. Indeed, ATA's own experience with the city of Los Angeles's attempt to impose preempted regulations on trucks serving its container port illustrates the recurring nature of the issues presented here. In that case—*American Trucking Associations* v. *City of Los Angeles*, 569 U.S. 641 (2013)—this Court rejected the City's reliance on an atextual "market participant" exception to the express preemption provision of the Federal Aviation Administration Act (FAAAA), 49 U.S.C. § 14501(c)(1), which Congress modeled on the express preemption provision of the Airline Deregulation Act (ADA), 49 U.S.C. § 41713(b)(1), at issue in this case. The result below, however, makes clear that the Ninth Circuit did not get the message. This case presents an opportunity for the Court to more fully address the scope of the market participant doctrine, and to ensure that decisions like the one

below do not allow state and local governments to evade Congress's preemptive intent simply by asserting a putative proprietary interest of any sort.

REASONS FOR GRANTING THE PETITION

I. This Case Involves a Recurring Issue of Exceptional Importance to Air and Motor Carriers, and to Congress's Decision to Deregulate Their Industries.

A. Much like the preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), on which this case is partly grounded, the preemption provision of the Federal Aviation Administration Authorization Act prohibits state and local governments from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier … with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Congress enacted that provision in 1994 with the goal of eliminating the patchwork of burdensome state trucking regulations that had previously developed, and to ensure that states would not undo federal deregulation of the trucking industry with impediments of their own.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress had made a commitment to deregulate the motor carrier industry, finding that "[t]he existing regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and ha[d] failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, at 10 (1980). It soon became clear, however, that federal deregulation could not achieve its objectives so long as burdensome and inconsistent state regulation

persisted. Congress found that "the regulation of intrastate transportation of property by the States" continued to "impose[] an unreasonable burden on interstate commerce;" "impede[] the free flow of trade, traffic, and transportation of interstate commerce;" and "place[] an unreasonable cost on the American consumers." FAAAA, Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605.

Congress's response was a preemption provision expressly incorporating the preemptive language and effect of the ADA's preemption provision, as this Court had broadly interpreted it in *Morales* v. *TWA*, 504 U.S. 374 (1992). See H.R. Conf. Rep. No. 103-677, at 83 (1994). As this Court has recognized, the fundamental purpose of these provisions is to "avoid … a State's direct substitution of its own governmental commands for 'competitive market forces'" in shaping the services provided by motor and air carriers. *Rowe*, 552 U.S. at 372 (quoting *Morales*, 504 U.S. at 378). Put differently, the preemption provisions of the FAAAA and ADA mean that "States may not seek to impose their own public policies or theories of competition or regulation on the operations" of air or motor carriers. *Am. Airlines* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995).

B. Despite this clear Congressional command and this Court's many precedents applying it, this is not the first time Los Angeles has sought to impose its own policy preferences on the air and motor carrier industries, relying on an atextual "market participant" exception to do what would otherwise be expressly preempted.

1. Much like this case, *American Trucking Associations* v. *City of Los Angeles*, 569 U.S. 641 (2013) involved an effort by Los Angeles to shape the

labor market at a major facility of interstate commerce, in that case the Port of Los Angeles—the largest container port in the country, *id*. at 644. It did so by requiring motor carriers to enter into a standard "concession agreement" binding it to various requirements in exchange for the right to provide drayage services at the Port. *Id*. at 645. Among the provisions at issue were a requirement that carriers convert to an employee-only business model (as opposed to using independent contractor drivers); a requirement that all trucks serving the Port display certain placards; and a requirement that carriers submit an off-street parking plan for those trucks. *Am. Trucking Ass'ns* v. *City of Los Angeles*, 660 F.3d 384, 394 (9th Cir. 2011), *rev'd in part*, 569 U.S. 641. The City argued that it imposed these requirements not as a regulator but "in its proprietary capacity as a market participant when it decided to enter into concession agreements," *id.* at 402, despite the fact that—like the present case—the requirements were not connected to the City's efficient procurement of goods or services, and the City did not participate in the market for the services at issue at all.

A divided panel of the Ninth Circuit agreed with the City that, insofar as the requirements were proprietary in nature, they would not have "the force and effect of law" and thus would not be preempted even if they related to prices, routes, or services under 49 U.S.C. § 14501(c) (or, in the case of the placard provision, even if they fell within the scope of a different statute expressly preempting states from requiring most displays of identification, 49 U.S.C. § 14506(a)). 660 F.3d at 395. And it further agreed that the market participant exception could apply even where the efforts were not directed at efficient procurement and the Port did not itself purchase

drayage services at all, simply because in its view, a "private port owner could (and probably would) enter into concession-type agreements with license motor carriers in order to further its goals." *Id*. at 402.

The panel analyzed the individual challenged requirements at issue to determine whether each served the government's "interests as a facilities manager." 660 F.3d at 402. It concluded that the parking and placarding provisions were not preempted, on the sweeping ground that they were directed at "[e]nhancing good-will in the community surrounding the Port," an "objectively reasonable business interest." *Id*. at 408. It held that the employee-only requirement, however, was preempted, because the Port could not "extend … conditions to the contractual relationships between motor carriers and third parties." *Ibid*.

2. ATA sought, and obtained, this Court's review on, *inter alia*, a question much the same as the one presented in the petition here: "[w]hether an unexpressed 'market participant' exception exists in Section 14501(c)(1) and permits a municipal governmental entity to take action that conflicts with the express preemption clause, occurs in a market in which the municipal entity does not participate, and is unconnected with any interest in the efficient procurement of services." Pet., *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013) (No. 11-798), 2011 U.S. S. Ct. Briefs LEXIS 2784 at *1-*2.

3. The United States agreed that the requirements at issue did not lose the "force and effect of law"—that is, did not escape preemption under a "market participant" exception—simply because the Port could assert some attenuated proprietary interest in them.

This was so, according to the government, for a variety of reasons.

a. For one, the United States observed that "a container port is far more akin to a publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation." Br. for the United States as Amicus Curiae Supporting Reversal, *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013) (No. 11-798), 2013 U.S. S. Ct. Briefs LEXIS 934 at *23 (U.S. Amicus Br.). The Port—much like the airport here—"furnishes access to channels of interstate commerce and international trade" that compares with no private entity. *Ibid.* And because facilities like the Port of Los Angeles "often exercise[] near-monopoly power within a region," the bottom line is that "any drayage service provider that seeks to do business in the Los Angeles region has little choice but to accede" to the Port's demands. Br. for the United States as Amicus Curiae, *Am. Trucking Ass'ns, Inc.* v. *City of Los Angeles*, 569 U.S. 641 (2013) (No. 11-798), 2012 U.S. S. Ct. Briefs LEXIS 5111 at *10. Thus, the United States concluded, the terms imposed by the Port "resemble[d] a license more than an arms-length commercial contract." U.S Amicus at *23.

b. In addition, the United States argued—much as petitioners argue here—that the requirements were "more regulatory than commercial in character" because they were "provisions of general applicability insofar as they govern on a permanent basis all drayage-service providers that wish to gain access to the Port." U.S. Amicus Br. at *18. Nor were the requirements "specifically tailored to one particular [transaction]," or "responsive 'to state procurement constraints or to local economic needs' or other

concrete commercial objectives." *Id.* at *23-*24 (quoting *Chamber of Commerce of the U.S.* v. *Brown*, 554 U.S. 60, 70 (2008)). And while the government acknowledged that the Port's putative desire to generate goodwill among local residents might be something a private company would also desire—much like the desire of respondent here to avoid "service disruptions," Pet. App. 13a—it argued that "a government entity could claim such an interest for even the most thinly veiled regulatory action." U.S. Amicus Br. at *24. Such a "general interest," the government argued, "does not suffice to establish that a government entity is acting as a market participant" rather than a regulator. *Ibid.*

C. This Court agreed, unanimously, that the challenged provisions were not saved from preemption by the Port's claim to have acted as a market participant, and reversed the Ninth Circuit in relevant part. 569 U.S. at 652. But it did so on relatively narrow grounds that did not require it to fully address the arguments outlined above—arguments that are again directly at issue in this case, and on which, as Petitioner has explained, Pet. 20-24, the courts of appeals are divided.

The Court in *ATA* noted that the concession agreements containing the challenged provisions were made mandatory by incorporation into the Port's tariff, violation of which in turn constituted a misdemeanor. 569 U.S. at 645. It held therefore that the Port had "exercised classic regulatory authority—complete with the use of criminal penalties—in imposing the placard and parking requirements at issue." *Id.* at 650. As such, the Port had "not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic."

Id. at 651. The Court acknowledged that, "[i]n some cases, the question whether governmental action has the force of law may pose difficulties," but that a case involving the threat of criminal sanctions "takes us nowhere near those uncertain boundaries." *Ibid.* The Court thus had no occasion to address the other questions on which the lower courts are split—whether a government entity may rely on a market participant exception to escape preemption when regulating a market in which it does not itself participate, and when its efforts are untethered to any interest in the efficient procurement of goods or services—much less the United States' suggestion that the very nature of major interstate commerce facilities such as a seaport (or airport) are not easily cast in the role of a mere private business when it comes to conditions of access.

And as long as those questions remain open, Los Angeles and other state and local governments will exploit the "uncertain boundaries" of the market participant doctrine, at the expense of the Congressional policy favoring deregulated air and motor carrier industries. To be clear, *ATA* should have been dispositive of this case, as petitioners explain in detail. Pet. 16-18. But once again, the Ninth Circuit has continued to maintain its outlier position that *any* putative business interest expressed by a governmental owner of a major transportation facility, no matter how attenuated, suffices to insulate its policy preferences from preemption. The Ninth Circuit (and any other courts that might choose to adopt its approach) will continue to allow governmental actors to pursue otherwise prohibited actions so long as they can assert a nebulous interest such as enhancing community goodwill or avoiding service disruptions at key transportation facilities. A

market participant exception of that scope is an exception capable of swallowing the general rule of preemption. And this, in turn, enables precisely the patchwork of state and local policy preferences that the Congress intended the ADA and FAAAA to preclude. See *Rowe*, 552 U.S. at 373.

This Court's review is urgently warranted here, because it provides an opportunity to squarely address the scope of the market participant exception in the context of federal preemption, resolve the conflicting approaches of the circuits, and preserve Congress's policy of air and motor carrier deregulation.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted.

RICHARD PIANKA
Counsel of Record
ATA Litigation Center
950 North Glebe Road
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Amicus Curiae

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